## APPENDIX A

Part IV of Brief for Defendants-Appellees
in the United States Court of Appeals
for the Seventh Circuit, pp. 10-11

THERE ARE NUMEROUS OTHER DEFICIENCIES IN THE COMPLAINT WHICH HAVE BEEN RAISED IN THE MOTION WHICH JUSTIFIES DISMISSAL. THE PLAINTIFFS MADE NO REFERENCE TO THEM IN THEIR BRIEF.

The Board of Education, being a body municipal in nature, is not a "person" within the meaning of the Civil Rights Act. *Monroe* vs. *Papa*, 365 U.S. 167 (1961).

The individual defendants have been sued both individually and in their official capacity for money damages. The actions complained of, however, occurred in the discharge of their official duties. Such an action cannot be maintained. This question was considered in *Abel* vs. *Gousha*, 313 F. Supp. 1030 (DCED, Wisc. 1970) where the Court said at page 1031:

> "Although the members of the school board are also sued in their individual capacities, the gravamen of the complaint is that they acted improperly as a corporate body in discharging the plaintiff. No individual action by any member of the board is complained about by the plaintiff. In my opinion the complaint does not state a cause of action against the individual members of the board, and they are entitled to dismissal as individuals. However, as the board of school directors, they must remain in the action with respect to the claim for reinstatement."

A similar issue was considered in *Henson* vs. *City of St. Francis*, 322 F. Supp. 1034. The teachers in that case complained that they did not have their contracts

renewed and received no explanation therefore. The Court said at pages 1036-1037:

> "To the extent that the plaintiffs seek damages against the school board, the action must be dismissed. These defendants are not "persons" within the meaning of that term as used in 42 U.S. §§ 1983 and 1985.

To the extent that equitable relief is sought, the injunction prayed for (to place the teachers on the higher salary schedule) is mandatory in nature and is the equivalent of a money judgment which has been ruled improper in the *Abel* and *Henson* cases. Equitable relief is clearly unnecessary.

## APPENDIX B

SHEA & GARDNER
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October 4, 1973

Mr. Kenneth J. Carrick
Clerk
United States Court of Appeals
United States Court House
219 South Dearborn Street
Chicago, Illinois 60604

Re: Aurora Education Ass'n East v. Board of Education of Aurora Public School Dist., No. 73-1085

Dear Mr. Carrick:

In June, after the Aurora Education Association East had filed its reply brief in this case, the Supreme Court handed down two decisions which bear directly upon the issues before this Court. These are: *Broadrick* v. *Oklahoma*, 41 U.S.L.W. 5111 (June 25, 1973), which deals with unconstitutional overbreadth of statutes affecting First Amendment rights; and *City of Kenosha* v. *Bruno*, 41 U.S.L.W. 4819 (June 11, 1973), which holds that municipalities are not subject to suit under 42 U.S.C. § 1983. We wish in this letter to bring to the Court's attention the following comments on these cases.

1. *Broadrick* v. *Oklahoma: Overbreadth Under the First Amendment.*

* * * *

2. *City of Kenosha: Suability Under 42 U.S.C. § 1983.*

In *City of Kenosha*, the Supreme Court held that cities

were not suable in an action for equitable relief brought under 42 U.S.C. § 1983. It had already held in *Monroe* v. *Pape*, 365 U.S. 167 (1961), that that section does not create a cause of action for damages against cities. See also *Moor* v. *County of Alameda*, 41 U.S.L.W. 4627 (May 14, 1973) (same result with regard to counties).

*City of Kenosha* raises a question whether the Aurora school board is suable under Section 1983. While we take the position that it is, this question need not be resolved here. This is so because the complaint names other defendants who are suable under that section—the school superintendent and the members of the school board (App. 1)—and the Court can therefore proceed to decide the constitutional issues presented in the case and leave the question of the suability of the school board for resolution on remand with full briefing and development of the facts.

*City of Kenosha*, *Monroe* and *Moor* do not affect the suability of the school superintendent and the members of the school board under Section 1983. Their holdings were based on legislative history which indicated explicitly that cities and counties were exempted from suit under Section 1983 while officials acting for those entities were not.[3] See, *e.g.*, *Monroe* v. *Pape*, *supra*, 365 U.S. at 175-77, 190-91; *Moor* v. *County of Alameda*, *supra*, 41 U.S.L.W. at 4632 n. 24. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908), establishes that government officials can be sued even where the government entities for which they acted are immune. This principle is reflected in decisions of this Court in Section 1983 cases involving both legal and equitable relief. Thus, in *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968), and *Donahue* v. *Stanton*, 471 F.2d 482 (7th Cir. 1972), both decided

[3] In its opinion in *City of Kenosha*, the Supreme Court emphasized that "[t]he only defendants named in the complaints . . . were . . . municipalities" (41 U.S.L.W. at 4821), and limited its holding to municipalities.

after *Monroe*, this Court held that damages could be awarded against school board members *(McLaughlin)* and hospital officials *(Donahue)* under Section 1983. See Reply Brief at 10-11. And in *Donahue*, the Court also held that the hospital officials could be ordered to reinstate a former chaplain of the hospital, who had been wrongfully discharged. To the same effect, see *Harkless* v. *Sweeney Independent School Dist.*, 427 F.2d 319, 323 (5th Cir. 1970); *Diamond* v. *Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Board of Trustees of Arkansas A & M College* v. *Davis*, 396 F.2d 730, 734 (8th Cir. 1968). In sum, there can be no doubt that Section 1983 creates a cause of action against the individual members of the school board and the school superintendent.

If the Court should pass on the question whether plaintiffs also have a cause of action against the school board under Section 1983, it should hold that they do. *City of Kenosha*, *Monroe* and *Moor* dealt only with the suability of cities and counties under Section 1983 and were grounded in that statute's legislative history indicating that Congress did not intend to authorize a cause of action against these parties. 41 U.S.L.W. at 4821; *id.* at 4632; 365 U.S. at 187-92. That history is not directly applicable to school boards, and the holdings in *City of Kenosha*, *Monroe* and *Moor* therefore should not be extended to grant them immunity from suit under Section 1983. See *Scher* v. *Board of Education*, 424 F.2d 741, 743-44 (3d Cir. 1970) (*Monroe* distinguished on grounds suit was against a school board, not a city); *Kates* and *Kouba*, "Liability of Public Entities Under Section 1983 of the Civil Rights Act," 45 *So. Calif. L. Rev.* 131, 152-55 (1972).

In any event, the Aurora School Board is properly before the Court on other grounds. As stated in their complaint, the association and plaintiff teachers have causes of action against it under the First and Fourteenth Amendments. See, *e.g.*, *Brown* v. *Board of Edu-*

*cation*, 347 U.S. 483 (1954); see also *City of Kenosha* v. *Bruno*, *supra*, 41 U.S.L.W. at 4821-22. And jurisdiction over those causes of action lies under 28 U.S.C. § 1343(3) which grants United States District Courts jurisdiction over civil actions authorized by law:

> "[t]o redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States. . . ."

*Robles* v. *El Paso Community Action Agency, Project Bravo, Inc.*, 456 F.2d 189 (5th Cir. 1972); *Paul* v. *Dade County*, 419 F.2d 10, 11-12 (5th Cir. 1969); see *Moyer* v. *Peabody*, 212 U.S. 78, 83 (1909) ("the question is whether this is a suit authorized by law, that is, by [Section 1983], or the Constitution, or both"); but see *Giancana* v. *Hoover*, 322 F.2d 789 (7th Cir. 1963).[4] Jurisdiction over plaintiffs' constitutional claims is also conferred by 28 U.S.C. § 1331, which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs; and arises under the Constitution, laws, or treaties of the United States."

These claims clearly arise under the Constitution. See, *e.g.*, *Powell* v. *McCormack*, 395 U.S. 486, 515-16 (1969); *Bell* v. *Hood*, 327 U.S. 678 (1946). The other prerequisite of Section 1331—that "the matter in controversy exceeds the sum or value of $10,000"—is also satisfied. The right which the association seeks to vindicate in this action exceeds $10,000 in value, for by refusing to recognize it as the bargaining representative of the teachers in the Aurora school system, the school board deprived the association of its primary reason for existing. The requi-

[4] In *City of Kenosha* the Supreme Court did not consider whether, wholly apart from Section 1983, the district court had jurisdiction under Section 1343(3) over the constitutional claims raised in that case. This possibility was apparently not called to its attention.

site jurisdictional amount is also met with regard to plaintiff teachers. Each loses a substantial sum every year he is denied his rightful position in the standard schedule of salaries and benefits. Courts take into account the amount of future earnings and benefits which an employee will lose as a result of a discharge or reduction in salary. See *Nord* v. *Griffin*, 86 F.2d 481, 483 (7th Cir. 1936); *Friedman* v. *International Ass'n. of Machinists*, 220 F.2d 808, 810 (D.C. Cir. 1955); 1 Moore, *Federal Practice* ¶ 0.96[2] (2d ed. 1968). In sum, then, the association and plaintiff teachers have justiciable claims against the board under the First and Fourteen Amendments, and this Court has jurisdiction of those claims under 28 U.S.C. §§ 1343(3) and 1331.[5]

Thus, all the defendants in this case are properly before the Court.

Respectfully,

/s/ Stephen J. Pollak
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*Plaintiffs-Appellants*

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[5] The complaint in this case does not cite Section 1331 as one of the statutory bases for jurisdiction, and it does not state that the jurisdictional prerequisites of that section have been satisfied. We hereby request that this Court permit amendment of the complaint to add these allegations. Leave to amend complaints to state a proper basis for jurisdiction is to be freely granted. *E.g., United Steelworkers of America, AFL-CIO* v. *Mesker Bros. Industries, Inc.*, 457 F.2d 91, 93 (9th Cir. 1972); 3 *Moore, supra*, ¶ 15.09; see also *Eklund* v. *Mora*, 410 F.2d 731 (5th Cir. 1969); 3 *Moore, supra*, ¶ 15.11, at 969.